A **ABDUL RAVUFF DATUK AS DAWOOD & ORS v. DR ABDUL RAHIMAN DATUK AS DAWOOD & OTHER APPEALS**

FEDERAL COURT, PUTRAJAYA
ABANG ISKANDAR CJ (SABAH & SARAWAK)
MOHD ZAWAWI SALLEH FCJ
B VERNON ONG LAM KIAT FCJ
ABDUL RAHMAN SEBLI FCJ
HARMINDAR SINGH DHALIWAL FCJ
[CIVIL APPEAL NOS: 02(f)-15-03-2020(W),
02(f)-16-03-2020(W) & 02(f)-17-03-2020(W)]
C 28 APRIL 2022

Abstract – *An agreement or a clause within an agreement alleged to have conferred a benefit upon a beneficiary or to have created any trust must clearly and unequivocally reflect such an intention by the donor,* D *and such intention must be consistent with any subsequent conduct of the donor. The donor, having made the promise or created the trust, ought also to have taken steps to implement the same; absent this, the trust may only amount to an incompletely constituted trust, especially so when no consideration was paid for the promise or promises.*

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TRUSTS: *Trusts and trustees – Creation of – Agreement – Whether agreement constituted trusts – Terms spelling out agreement to transfer shares – Whether created constructive trusts – Whether intention to create trust equivocal and clear from agreement – Whether there was declaration of creation of trust – Whether* F *conduct consistent with intention of donor – Whether trust created*

LAND LAW: *Sale of land – Agreement – Sale by company to third party purchaser and subsequent sale – Whether sham agreement – Whether sale resolved at extraordinary general meeting of company – Whether consideration paid by third party purchaser – Whether subsequent sale below market value – Whether valuation* G *report submitted to support claim – Whether sale of land valid*

AS Dawood ('Dawood') had four wives and 20 children and the first to fourth defendants are the children of Dawood's first wife, Ammaji Bibi ('Ammaji'). The fifth defendant ('Pasla Holdings') was a company H incorporated by Dawood, wherein, Dawood and Ammaji were its original shareholders and directors. Dawood transferred his very large rubber estate to Pasla Holdings and caused Pasla Holdings to issue shares to himself, Ammaji and his 20 children. Dawood held 540,000 shares whilst Ammaji held 20,000 shares. The children held 440,000 shares. Out of this, the I plaintiffs were the registered owners of 130,000 shares in Pasla Holdings. Just before Dawood's death on 3 April 1989, all his 540,000 shares were transferred to Ammaji for love and affection *via* two transfer forms dated 29 March 1989 and the shares were duly registered under the name of

Ammaji. Subsequently, *vide* a sale and purchase agreement dated 18 June 1991, approximately 180 acres of Pasla Holdings' land was sold to the sixth defendant, Azinal Sdn Bhd ('Azinal') for a consideration of RM5.6 million. *Vide* a trust deed, Ammaji appointed the second defendant as her trustee and transferred her 560,000 shares in Pasla Holdings to the second defendant to hold in trust for her. Following her death, the second defendant was made the administrator of her estate. In 2012, Pasla Holdings and Azinal entered into a sale and purchase agreement with Vision Wagon Sdn Bhd ('Vision Wagon') to sell 395 acres of Pasla Holding's land, inclusive of the land earlier sold to Azinal, for RM61,972,993.21.

Some eight years after Dawood had passed away, the plaintiffs filed a winding-up petition against Pasla Holdings, relying on an agreement dated 29 July 1981 between Dawood and Ammaji ('1981 agreement'). The terms of the agreement which formed the crux of the instant dispute were, *inter alia*, that: (i) Dawood agreed to transfer his sole proprietorship business to a company incorporated by him and pending that transfer, he was to hold the business in trust for that company; (ii) he agreed to transfer 110,000 shares (11%) in Pasla Holdings to the plaintiffs; (iii) the first plaintiff would be appointed as a director in Pasla Holdings together with one of the children from each of the other three families. The 540,000 shares in Pasla Holdings that were transferred to Ammaji, included the 110,000 shares. The winding-up petition was dismissed by the High Court. An appeal to the Court of Appeal was dismissed and leave to appeal to the Federal Court was rejected. Further proceedings in the Syariah Courts were also unsuccessful and the action was dismissed in 2007. The plaintiffs then filed the suit, the subject matter of these appeals, essentially (i) based upon a constructive trust arising from the 1981 agreement; (ii) that the sale of the 180 acres of land to Azinal was not *bona fide*; and (iii) that the lands belonging to Pasla Holdings were sold below market value to Vision Wagon. The plaintiffs claimed that with the 1981 agreement being a trust, they were entitled to the 110,000 shares and that Ammaji and the second defendant acted in breach of the trust. They claimed that the defendants had converted the plaintiffs' right, title and interest in the lands in question to their own use and were therefore jointly and severally liable to compensate the plaintiffs for their loss. The High Court found for the plaintiffs. However, on appeal by the defendants, the Court of Appeal reversed the decision principally on the grounds that there was no constituted trust and that in any event, limitation and laches barred the action. The court also held that the sale to Azinal was *bona fide* and that there was no undervalue in the subsequent sale to Vision Wagon. In these appeals, the questions of law raised were: (i) whether the 1981 agreement constituted a trust; (ii) whether the action was barred by limitation and the doctrine of laches; and (iii) whether the subsequent sale of the Pasla Holdings lands were invalid or sold below market value to Vision Wagon.

Held (dismissing appeals; affirming decision of Court of Appeal)
Per Harmindar Singh Dhaliwal FCJ delivering the judgment of the court:

(1) Whether an agreement or document creates a trust is an issue of construction of the so-called trust document and not an issue of fact. The intention to create a trust must appear sufficiently unequivocal and clear. There was no declaration of a trust in respect of the shares of Pasla Holdings as there was in respect of the shares of AS Dawood Sdn Bhd, consistent with the conduct of Dawood after the 1981 agreement was effected. The intention of Dawood to transfer his shares to the plaintiffs was far from certain. He could have easily signed share transfer forms in favour of any of the plaintiffs, but he did not do so. Instead, the transfer forms were signed in favour of Ammaji. As no steps were taken by Dawood to implement the so-called promise of the additional allotment of shares to his children, at best, it was an incompletely constituted trust as no consideration was paid for the promises. This was merely a comfort agreement to keep the peace within the families. (paras 13-16)

(2) There is no equity to perfect an imperfect gift and the law of trusts could not be invoked to effectuate an incomplete gift nor could equity assist a volunteer. The rule is that the donor must have done everything according to the nature of the property to transfer the property to the donee and render the settlement binding on him. The policy reason behind this principle is that where no consideration is provided, the donor can always change his/her mind before the gift is perfected. As the donor, the shares were for Dawood to deal with and despite the use of the word 'forthwith' in the 1981 agreement, he did nothing to affect the transfer of shares. Therefore, no trust was created as Dawood did not have any intention to create a trust nor could he be said to have held the shares as trustee for the plaintiffs. (paras 18 & 22)

(3) In any event, limitation had set in and the doctrine of laches acted against the plaintiffs. In particular, the claim was not for the recovery of trust property but a monetary equivalent of the shares. Also, a strong case for laches was made out when the action was only brought many years later when all the witnesses to the 1981 agreement had passed away. (para 26)

(4) The sale of the lands to Vision Wagon was sanctioned by a resolution passed by Pasla Holdings in an extraordinary general meeting followed by another resolution by Pasla Holding's Board of Directors for the same sale. Further, the first plaintiff had admitted knowledge of the sale of the land by Pasla Holdings to Azinal and the part payment of RM4.5 million by Azinal, whilst the third plaintiff admitted that they knew about the joint-venture with Azinal even before the winding-up and the Syariah Court proceedings. Hence, the High Court's finding that the consideration of RM5.15 million was never paid by Azinal to Pasla

Holdings was clearly unsustainable and against the weight of evidence and contradicted the first plaintiff's own admission as well as the contemporaneous documents adduced at the trial. (paras 30-33)

(5) The High Court had also erred in law and/or fact when it held that the market value of the lands was at around RM6 psf without reference to any independent valuation report and by erroneously relying on a private valuation for the purpose of land acquisition of RM6 psf which was never accepted by the High Court during the 2010 land acquisition proceedings. Hence, no loss was suffered by any of the beneficiaries as the sale to Azinal was not a sham sale and the sale to Vision Wagon was proven to be at market price. The court also held that the parties were entitled to any profits from the sale of lands in question up to the extent of their existing shareholding but not to the extra shares which was the subject matter of the instant action. (paras 34 & 36)

Bahasa Melayu *Headnotes*

AS Dawood ('Dawood') mempunyai empat orang isteri dan 20 anak dan defendan-defendan pertama hingga keempat adalah anak-anak Dawood dengan isteri pertamanya, Ammaji Bibi ('Ammaji'). Defendan kelima ('Pasla Holdings') adalah syarikat yang ditubuhkan oleh Dawood, iaitu, Dawood dan Ammaji adalah pemegang saham dan pengarah asal. Dawood memindahkan ladang getah yang besar kepada Pasla Holdings dan menyebabkan Pasla Holdings mengeluarkan saham-saham kepada dirinya sendiri, Ammaji dan 20 orang anaknya. Dawood memegang 540,000 saham sementara Ammaji memegang 20,000 saham. Anak-anaknya memegang 440,000 saham. Daripada ini, plaintif-plaintif adalah pemilik berdaftar 130,000 saham dalam Pasla Holdings. Tidak lama sebelum kematian Dawood pada 3 April 1989, kesemua 540,000 sahamnya dipindah milik kepada Ammaji atas dasar kasih sayang melalui dua borang pindah milik bertarikh 29 Mac 1989 dan saham-saham itu didaftarkan bawah nama Ammaji. Kemudian, melalui perjanjian jual beli bertarikh 18 Jun 1991, lebih kurang 180 ekar tanah Pasla Holdings dijual kepada defendan keenam, Azinal Sdn Bhd ('Azinal') untuk balasan RM5.6 juta. Melalui surat ikatan amanah, Ammaji melantik defendan kedua sebagai pemegang amanahnya dan memindah milik 560,000 saham dalam Pasla Holdings kepada defendan kedua untuk dipegang sebagai amanah untuknya. Berikutan kematiannya, defendan kedua dilantik sebagai pentadbir hartanah Ammaji. Pada 2012, Pasla Holdings dan Azinal memeterai perjanjian jual beli dengan Vision Wagon Sdn Bhd ('Vision Wagon') untuk menjual 395 ekar tanah Pasla Holdings, termasuk tanah yang dijual sebelum ini kepada Azinal, untuk RM61,972,993.21.

Kira-kira lapan tahun selepas kematian Dawood, plaintif-plaintif memfailkan petisyen penggulungan terhadap Pasla Holdings, bersandar pada perjanjian bertarikh 29 Julai 1981 antara Dawood dan Ammaji ('perjanjian 1981'). Terma-terma perjanjian yang membentuk asas pertikaian di sini adalah,

A antara lain, bahawa: (i) Dawood bersetuju memindah milik perniagaan persendiriannya kepada syarikat yang ditubuhkan olehnya dan sementara pindah milik itu, dia akan memegang perniagaan itu sebagai amanah untuk syarikat tersebut; (ii) dia bersetuju memindah milik 110,000 saham (11%) dalam Pasla Holdings kepada plaintif-plaintif; (iii) plaintif pertama akan
B dilantik sebagai pengarah dalam Pasla Holdings bersama-sama dengan seorang anaknya daripada setiap keluarga lain. 540,000 saham dalam Pasla Holdings yang dipindah milik kepada Ammaji, adalah termasuk 110,000 saham tersebut. Petisyen penggulungan tersebut ditolak Mahkamah Tinggi. Rayuan ke Mahkamah Rayuan ditolak dan kebenaran merayu ke Mahkamah
C Persekutuan dinafikan. Prosiding selanjutnya di Mahkamah Syariah juga gagal dan tindakan tersebut ditolak pada 2007. Plaintif-plaintif kemudian memfailkan tindakan yang menjadi perkara rayuan-rayuan ini, pada asasnya (i) berdasarkan amanah konstruktif berbangkit daripada perjanjian 1981; (ii) bahawa jualan 180 ekar tanah kepada Azinal tidak *bona fide*; (iii) bahawa tanah-tanah milik Pasla Holdings dijual bawah nilai pasaran kepada Vision
D Wagon. Plaintif-plaintif menuntut bahawa oleh sebab perjanjian 1981 adalah dalam amanah, mereka berhak pada 110,000 saham dan bahawa Ammaji dan defendan kedua bertindak melanggar amanah. Mereka mendakwa bahawa defendan-defendan memindahkan hak, hak milik dan kepentingan plaintif-plaintif dalam tanah-tanah yang dipersoalkan kepada kegunaan mereka
E sendiri dan adalah bertanggungan secara bersesama dan berasingan untuk memampas plaintif-plaintif atas kerugian mereka. Mahkamah Tinggi membuat dapatan berpihak pada plaintif-plaintif. Walau bagaimanapun, atas rayuan oleh defendan-defendan, Mahkamah Rayuan mengakas keputusan itu, pada asasnya atas alasan-alasan bahawa tiada amanah konstruktif dan bahawa
F walau apa pun, had masa dan kelengahan menghalang tindakan tersebut. Mahkamah juga memutuskan bahawa jualan kepada Azinal adalah *bona fide* dan bahawa jualan kemudian kepada Vision Wagon bukan bawah nilai pasaran. Dalam rayuan-rayuan ini, soalan-soalan undang-undang yang dibangkitkan adalah: (i) sama ada perjanjian 1981 membentuk amanah;
G (ii) sama ada tindakan dihalang had masa dan doktrin kelengahan; dan (iii) sama ada jualan terkemudian tanah Pasla Holdings tidak sah atau dijual bawah nilai pasaran kepada Vision Wagon.

Diputuskan (menolak rayuan-rayuan; mengesahkan keputusan Mahkamah Rayuan)

H **Oleh Harmindar Singh Dhaliwal HMP menyampaikan penghakiman mahkamah:**

(1) Sama ada perjanjian atau dokumen membentuk amanah adalah satu isu tafsiran atau dokumen amanah dan bukan isu fakta. Niat untuk membentuk amanah mesti kelihatan jelas dan terang dengan secukupnya.
I Tiada deklarasi amanah berkaitan saham-saham Pasla Holdings seperti saham-saham AS Dawood Sdn Bhd, konsisten dengan tindakan Dawood selepas perjanjian 1981 dimeterai. Niat Dawood untuk memindah milik saham kepada plaintif-plaintif amat tidak jelas. Dia boleh dengan

mudahnya menandatangani borang pindah milik saham kepada plaintif-plaintif, tetapi tidak berbuat demikian. Sebaliknya, borang-borang pindah milik ditandatangani berpihak pada Ammaji. Oleh sebab tiada langkah diambil Dawood untuk melaksanakan janji yang dikatakan berkaitan dengan pemberian saham kepada anak-anaknya, itu adalah amanah dibentuk dengan tidak lengkap kerana tiada balasan dibayar untuk janji-janji tersebut. Ini semata-mata perjanjian menenangkan untuk memastikan keluarganya aman.

(2) Tiada ekuiti untuk melengkapkan hadiah yang tidak lengkap dan undang-undang amanah tidak boleh dibangkitkan untuk melaksanakan hadiah tidak lengkap atau ekuiti tidak boleh membantu seorang yang memberi secara rela. Kaedah adalah bahawa pemberi amanah sepatutnya membuat kesemua menurut sifat hartanah untuk memindah milik hartanah kepada penerima milik dan menjadikan penyelesaian tersebut mengikat padanya. Alasan polisi untuk prinsip ini adalah, apabila tiada balasan diberi, pemberi amanah boleh menukar fikiran sebelum hadiah dimuktamadkan. Sebagai pemberi amanah, saham-saham tersebut adalah untuk ditangani Dawood dan walaupun dengan penggunaan perkataan 'forthwith' dalam perjanjian 1981, dia tidak berbuat apa-apa untuk melaksanakan pindah milik saham-saham tersebut. Oleh itu, tiada amanah yang dibentuk kerana Dawood tidak mempunyai apa-apa niat untuk membentuk amanah atau dia boleh dikatakan memegang saham-saham itu atas amanah untuk plaintif-plaintif.

(3) Walau apa pun, had masa terpakai dan doktrin kelengahan masa terpakai terhadap plaintif-plaintif. Khususnya, tuntutan tersebut bukan untuk mendapatkan semula harta amanah tetapi untuk wang pada nilai saham-saham tersebut. Juga, kes kelengahan yang kukuh dibuktikan apabila tindakan tersebut hanya dibawa beberapa tahun kemudian apabila kesemua saksi perjanjian 1981 telah pun meninggal dunia.

(4) Jualan tanah kepada Vision Wagon diluluskan oleh resolusi yang diluluskan oleh Pasla Holdings dalam mesyuarat agung luar biasa disusuli satu lagi resolusi oleh Lembaga Pengarah Pasla Holdings untuk jualan sama. Selanjutnya, plaintif pertama mengesahkan mempunyai pengetahuan tentang jualan tanah oleh Pasla Holdings kepada Azinal dan sebahagian bayaran sejumlah RM4.5 juta oleh Azinal, sementara plaintif ketiga mengesahkan bahawa mereka mengetahui tentang usahasama dengan Azinal walaupun sebelum prosiding-prosiding penggulungan dan Mahkamah Syariah. Oleh itu, dapatan Mahkamah Tinggi bahawa balasan RM5.15 juta tidak pernah dibayar Azinal kepada Pasla Holdings jelas tidak boleh dikekalkan dan bertentangan dengan beban keterangan dan mencanggah pengakuan plaintif pertama sendiri serta dokumen-dokumen semasa yang dikemukakan dalam perbicaraan.

(5) Mahkamah Tinggi juga terkhilaf dari segi undang-undang dan/atau fakta apabila memutuskan bahawa nilai pasaran tanah pada kira-kira RM6 sekaki persegi tanpa rujukan pada mana-mana laporan nilaian bebas dan dengan secara khilaf bersandar pada nilaian persendirian untuk tujuan pengambilan tanah pada RM6 sekaki persegi yang tidak pernah diterima Mahkamah Tinggi semasa prosiding pengambilan tanah pada 2010. Oleh itu, tiada kerugian dialami oleh mana-mana benefisiari kerana jualan kepada Azinal bukan jualan palsu dan jualan kepada Vision Wagon terbukti dibuat pada nilai pasaran. Mahkamah juga memutuskan bahawa pihak-pihak berhak pada apa-apa keuntungan hasil jualan tanah yang dipersoalkan setakat pegangan saham sedia ada tetapi bukan untuk saham selebihnya, yang menjadi perkara dalam tindakan ini.

Case(s) referred to:

Lee Eng Teh & Ors v. Teh Thiang Seong & Anor [1966] 1 LNS 79 HC ***(refd)***
Milroy v. Lord (1862) 4 De GF & J 264 ***(foll)***
Parmeshiri Devi & Anor v. Pure Life Society [1970] 1 LNS 98 HC ***(refd)***
Pennington v. Waine [2002] 1 WLR 2075 ***(dist)***
Re Kayford Ltd [1975] 1 WLR 279 ***(refd)***
Wan Naimah v. Wan Mohamad Nawawai [1972] 1 LNS 164 FC ***(refd)***
Zeital & Another v. Kaye & Others [2010] EWCA Civ 159 ***(refd)***

For the appellants - Gopal Sri Ram, V Manokaran, Rajenthirakumar Kumar, Austen Pereira & Hiu Yeat Fong; M/s Kumar Assocs

(Civil Appeal No: 02(f)-15-03-2020 (W))
For the respondent - K Terrance & Seen Rui Yong; M/s Kassim Tadin Wai & Co

(Civil Appeal No: 02(f)-16-03-2020 (W))
For the respondent - M Pathmanathan, Rutheran Sivagnanam, Shirin Pathmanathan & Chong Yi Zhen; M/s R Sivagnanam & Assoc

(Civil Appeal No: 02(f)-17-03-2020 (W))
For the respondents - Cyrus Das, Krishna Dallumah & Yong Yoong Hui; M/s Krishna Dallumah & Indran

[Editor's note: For the Court of Appeal judgment, please see Azinal Sdn Bhd v. Abdul Ravuff AS Dawood & Ors & Other Appeals [2018] 1 LNS 1656 (affirmed).]

Reported by S Barathi

JUDGMENT

Harmindar Singh Dhaliwal FCJ:

[1] There are three appeals before us. They concern a dispute of the families of the late AS Dawood who had four wives and 20 children. The dispute is over alleged trust properties held in the family company Pasla Holdings Sdn Bhd ("Pasla Holdings"). The appeals are directed against the decision of the Court of Appeal which had set aside the order of the High Court. The High Court had allowed the plaintiffs' claim after a full trial. With that claim now being set aside, the plaintiffs/appellants have now filed these appeals.

[2] It may also be in order to record that the appeals were filed when leave to appeal was granted on 20 February 2020 upon the following questions of law:

(i) Whether a contract entered into between parties that seeks to confer a benefit upon a stranger to that contract prevents the imposition of a constructive trust having regard to the decisions of the House of Lords in *Beswick v. Beswick* [1968] AC 58 as well as *Vandepitte v. Preferred Accident Insurance Company* [1933] AC 70 and that of the Federal Court in *RHB v. Travelsight (M) Sdn Bhd* [2016] 1 MLJ 175.

(ii) Whether the distinction between a constructive trustee and an accessory or ancillary as exists in English Law by reason of the decision of the *UK Supreme Court in Williams v. Central Bank of Nigeria* [2014] 2 All ER 489 exists under the law of Malaysia having regard to the decision of the Federal Court in *RHB v. Travelsight (M) Sdn Bhd* [2016] 1 MLJ 175 whereby a remedial constructive trust is recognised.

(iii) Whether the period of limitation prescribed by section 22(2) of the Limitation Act 1953 applies to a constructive trustee under a remedial constructive trust having regard to the provisions of section 22(1)(b) of the said Act, having regard to the decision of the UK Supreme Court in *Williams v. Central Bank of Nigeria* [2014] 2 All ER 489 as compared with the decision of the Federal Court in *RHB v. Travelsight (M) Sdn Bhd* [2016] 1 MLJ 175.

(iv) Whether the defence of lashes is available to a defendant in an action for breach of a constructive trust for the recovery of property or the value thereof having regard to the decision of the Privy Council in *Lindsay Petroleum v. Hurd* (1874) LR 5 PC 221.

(v) Whether the doctrine in *Milroy v. Lord* (1862) 45 ER 1185 applies to a case of a constructive trust (remedial or institutional) having regard to the decisions of the English Court of Appeal in *Pennington v. Waine* [2002] 1 WLR 2075 and in *FHR European Ventures v. Mankarious* [2013] 1 Lloyd's Rep 416 as well as the decision of the New South Wales Supreme Court in *Le Compte v. Public Trustee* [1983] 2 NSWLR 109.

(vi) Whether a Court of Appeal is entitled to reverse findings of fact made by the trial judge based on credibility without making a finding that the trial judge was plainly wrong having regard to the decisions of the Federal Court in *Pushpaleela v. Rajamani* [2019] 2 MU 553 and *Tengku Dato Ibrahim Petra v. Petra Perdana Bhd* [2018] 2 MU 177 and the guidelines laid down in *Henderson v. Foxworth Investments* [2014] 1 WLR 2600, *McGraddie v. McGraddie* [2013] 1 WLR 2477 and *Beacon Insurance v. Maharaj Bookstore* [2014] 4 All ER 418.

(vii) Whether a claim by beneficiaries against a trustee under a constructive trust to be indemnified for losses suffered by them with an alternative claim for equitable compensation amounts to a monetary claim or whether such a claim is a proprietary claim having regard to the decision of the House of Lords in *Target Holdings v. Redfern* [1996] 1 AC 421 and that of the UK Supreme Court in *AIB Group v. Mark Redler* [2015] AC 1503.

[3] Due to the number of parties involved and appeals filed herein, it may be convenient to refer to the parties as they were in the High Court or by their abbreviated names.

Factual Background

[4] AS Dawood ("Dawood"), as stated earlier, had four wives and 20 children. The plaintiffs are the children of his fourth wife who all reside in India. The first to fourth defendants are the children of Dawood's first wife, Ammaji Bibi bt Daud Sha ("Ammaji"). The fifth defendant ("Pasla Holdings") is a company incorporated by Dawood in 1976. Dawood and his first wife, Ammaji, were its original shareholders and directors. Dawood transferred his very large rubber estate to Pasla Holdings and caused Pasla Holdings to issue shares to himself, Ammaji and his 20 children. Dawood held 540,000 shares whilst Ammaji held 20,000 shares. The children held 440,000 shares. Out of this, the plaintiffs are the registered owners of 130,000 shares in Pasla Holdings.

[5] Just before Dawood's death on 3 April 1989, all his 540,000 shares were transferred to Ammaji for love and affection *via* two transfer forms dated 29 March 1989. The 540,000 shares were duly registered under the name of Ammaji. It was claimed that this was done to avoid payment of estate duties. Notably, it was never the case of the plaintiffs in the suit that the transfer of the shares from Dawood to Ammaji was procured by fraud or forgery.

[6] Subsequently, *vide* a sale and purchase agreement dated 18 June 1991, approximately 180 acres of Pasla Holdings' land was sold to the sixth defendant, Azinal Sdn Bhd ("Azinal") for a consideration of RM5.6 million. *Vide* a trust deed dated 11 August 1997, Ammaji appointed the second defendant as her trustee and two days later she transferred her 560,000 shares in Pasla Holdings to the second defendant to hold in trust for her. Following her death, the second defendant was made the administrator of her estate in a grant of probate dated 4 April 2014 and that is how he came to be sued in both his personal and representative capacity. To complete the narrative, in 2012, Pasla Holdings and Azinal entered into a sale and purchase agreement with Vision Wagon Sdn Bhd to sell 395 acres of Pasla Holding's land (inclusive of that which was earlier sold to Azinal) for RM61,972,993.21.

[7] In between, certain significant events had taken place. Some eight years after Dawood had passed away, the plaintiffs filed a winding-up petition against Pasla Holdings. The plaintiffs relied on an agreement dated 29 July 1981 ("1981 agreement"). It was an agreement between Dawood and Ammaji. This agreement forms the crux of the instant dispute. For convenience, the relevant parts of the agreement are reproduced as follows:

Agreement

This Agreement made this 29th day of July, 1981 **Between Datuk A.S. Dawood J.P., K.M.N.,** NRIC No. 1297832 of No. 281, Jalan Temiang, Seremban (hereinafter called the First Party) of the one Part **And Datin Ammaji Bibi bte Daudshah,** NRIC No. 1297831, of No. 281, Jalan Temiang, Seremban (hereinafter called the Second Party) of the other part.

WHEREAS family differences have risen between the parties hereto and the First Party with the concurrence and agreement of all the members of his family has agreed to a settlement of his assets and/or properties in the manner following.

Now It Is Hereby Agreed as follows:

1. In consideration of the Second Party paying to the First Party a sum of $420,000 (Ringgit Four Hundred and Twenty Thousand Only) the First Party who is the sole proprietor of the business of A.S. Dawood & Co., now carried on at No. 67, Paul Street, Seremban shall forthwith transfer the said business without any encumbrances thereon and all its assets including book debts to Syarikat A.S. Dawood Sdn. Bhd. and pending such transfer shall hold the said business in trust for the transferees. The First Party shall pay to the Second Party an additional sum of $100,000 (Ringgit One Hundred Thousand Only) at the time the transfer of the business is effected.

2. The First Party shall pay to the Second Party a sum of $50,000 (Ringgit Fifty Thousand Only) when the building plans in respect of premises number 87, Paul Street, Seremban, is approved by the relevant authorities.

3. Datuk A.S. Dawood, who is the current registered holder of 54 (fifty four) fully paid shares in Pasla Holdings Sdn. Bhd. shall forthwith transfer for natural love and affection to Dr. Abdul Rahiman bin A.S. Dawood 3 shares, Mohamed bin Dawood 3 shares, Ibrahim bin Dawood 2 shares, Abdul Razak bin Dawood 3 shares, Halimah binti Dawood 1 share, Hanipah binti Dawood 1 share, Jamilah binti Dawood 1 share and Datin Ammaji Bibi binti Daudshah 1 share, the children by the second wife 4 shares, the children by the third wife 9 shares, the children by the fourth wife 11 shares and shall thereby retain 15 shares for himself.

4. An additional four (4) persons, namely Dr. Abdul Rahiman bin Dawood, Abdullah Dawood, Sultan Batch and Abdul Rauf shall be appointed as Directors of Pasla Holdings Sdn. Bhd, **provided** however that these Directors shall accept their appointment without the payment of any Directors allowance and **Further Provided** that they shall not at any time object or reduce the allowances of the First Party remaining at $2,500 (Ringgit Two Thousand Five Hundred Only) and of the Second Party remaining at $700 (Ringgit Seven Hundred Only).

[8] It is significant to note that the agreement is in several parts. Under cl. 1, Dawood agreed to transfer his sole proprietorship business to a company incorporated by him and pending that transfer he was to hold the business in trust for that company. In cl. 3, he agreed to transfer 110,000 shares (11%) in Pasla Holdings to the plaintiffs. Further, the first plaintiff would be appointed as a Director in Pasla Holdings together with one of the children from each of the other three families. As noted earlier, after Dawood's death on 3 April 1989, 540,000 shares in Pasla Holdings were transferred to Ammaji. This included the 110,000 shares in question.

[9] Now, the winding-up petition was dismissed by the High Court on 8 February 1997. An appeal to the Court of Appeal was dismissed and leave to appeal to the Federal Court was rejected. Further proceedings in the Syariah Courts were also unsuccessful and the action was dismissed in 2007. The plaintiffs then filed the suit that is the subject matter of these appeals.

Proceedings In The Courts Below

[10] In essence, the plaintiffs' claim is based upon a constructive trust arising from the 1981 agreement. The plaintiffs also claimed that the sale of the 180 acres of land to Azinal was not *bona fide* and that the lands belonging to Pasla Holdings were sold below market value to Vision Wagon Sdn Bhd ("Vision Wagon"). In particular, the plaintiffs claimed that with the 1981 agreement being a trust, they were entitled to the 110,000 shares. Effectively, they claimed that Ammaji and then the second defendant acted in breach of the trust. They claimed that the defendants had converted the plaintiffs' right, title and interest in the lands in question to their own use and are therefore jointly and severally liable to compensate the plaintiffs for their loss.

[11] The High Court, after a trial lasting 21 days at which 13 witnesses gave evidence, found for the plaintiffs. On appeal by the defendants, the Court of Appeal reversed principally on the grounds that there was no constituted trust and that in any event limitation and laches barred the action. The court also held that the sale to Azinal was *bona fide* and that there was no undervalue in the subsequent sale to Vision Wagon.

The Instant Appeals

[12] After due consideration of the submissions of the parties, the leave questions and the proceedings in the courts below, the pivotal issues for our consideration were broadly: firstly, whether the 1981 agreement constitutes a trust, and secondly, whether the action was barred by limitation and the doctrine of laches and thirdly, whether the subsequent sale of the Pasla Holdings lands were invalid or sold below market value to Vision Wagon.

[13] On the pivotal question of whether the 1981 agreement constituted a trust, there was considerable argument on the proper interpretation of the said 1981 agreement in the courts below and which continued before us. The starting point over whether an agreement or document creates a trust is the

construction of the instrument and the words used by the donor himself. It is an issue of the construction of the so-called trust document and not an issue of fact (see *Parmeshiri Devi & Anor v. Pure Life Society* [1970] 1 LNS 98; [1971] 1 MLJ 142). The intention to create a trust must appear sufficiently unequivocal and clear (see *Re Kayford Ltd* [1975] 1 WLR 279). Whether there was an intention to create a trust turns entirely on the peculiar facts of a case (see *Wan Naimah v. Wan Mohamad Nawawai* [1972] 1 LNS 164; [1974] 1 MLJ 41).

[14] In the instant case, it is relevant to note that there was no declaration of a trust in respect of the shares of Pasla Holdings (cl. 3) as there was in respect of the shares of A.S. Dawood Sdn Bhd (cl. 1). In cl. 1, Dawood expressly declared that in respect of A.S. Dawood Sdn Bhd, pending such transfer, Dawood "shall hold the business in trust for the transferee". There is no such corresponding declaration of a trust in cl. 3 over any of the proposed additional allotments of shares in Pasla Holdings to the children of the four families.

[15] This is consistent with the conduct of Dawood after the 1981 agreement was effected. The intention of Dawood to transfer his shares to the plaintiffs was far from certain. He could have easily signed share transfer forms in favour of any of the plaintiffs but he did not do so. Instead, the transfer forms were signed in favour of Ammaji. Significantly, none of the named parties, apart from the second defendant, were appointed Directors for some eight years prior to Dawood's demise. This was again contrary to what was stated in the 1981 agreement. In fact, yearly meetings of Pasla Holdings were held and yet none of the children mentioned in the 1981 agreement were appointed as Directors. It is also worth noting that Dawood, far from confirming the 1981 agreement, was instead very active in the business of Pasla Holdings and continued to decide on matters on his own. He was instrumental in entering into the joint venture with Azinal as well as transactions with regard to the sale of Pasla Holdings' lands.

[16] As no steps were taken by Dawood to implement the so-called promise of the additional allotment of shares to his children, it seemed to us that at best, it was an incompletely constituted trust as no consideration was paid for the promises. As noted by the Court of Appeal, this was merely a comfort agreement to keep the peace within the families.

[17] In *Lee Eng Teh & Ors v. Teh Thiang Seong & Anor* [1966] 1 LNS 79; [1967] 1 MLJ 42, Gill J held that a gratuitous promise made by a businessman to donate a piece of land to a school was unenforceable as an incomplete gift with the following observation (at p. 44):

> The next question to be considered is whether the promise made by the first defendant constituted a trust which is enforceable. Whether a trust is enforceable or not depends upon whether it is completely or an incompletely constituted trust. A trust is said to be completely constituted when the trust property has been vested in trustees for the benefit of the

beneficiaries: until that has been done the trust is incompletely constituted. The distinction between completely and incompletely constituted trusts is of importance principally with regard to the question of consideration. In other words, the question to be considered is whether valuable consideration was given for the creation of the trust. If valuable consideration is given in exchange for the creation of the trust, it does not matter whether the trust is completely constituted or not, for equity regards as done that which ought to be done and will perfect an imperfect conveyance for value by treating it as a contract to convey. But there is no equity to perfect an imperfect voluntary trust. As was said by Lord Eldon in *Ellison Ellison* (1802) 6 Ves 656 662 6 RR 19:

> I take the distinction to be, that if you want the assistance of the court to constitute a *cestui que* trust, and the instrument is voluntary, you shall not have that assistance, for the purpose of constituting a *cestui que* trust, as upon a covenant to transfer stock, if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant, but if the party has completely transferred stock, though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court.

The general principle applicable has been enunciated by Turner LJ in *Milroy Lord* (1862) 4 De GF & J 264; 31 LJ Ch 798, as follows:

> In order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do his by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes ... But, in order to render the settlement binding, one or other of these modes must (as I understood the law of this court) be resorted to, for there is no equity in this court to perfect an imperfect gift.
>
> In the present case, of course, there is no question of any conveyance having been made. In other words, matters did not go so far as to lead up to what might be called an incompletely constituted trust. The first defendant did nothing more than make a gratuitous promise to donate land, so that there was no question of any incompletely constituted trust having arisen. The action against him, therefore, must fail.

[18] In the instant case, the classic principle set out in *Milroy v. Lord, supra* must also apply in that there is no equity to perfect an imperfect gift and the law of trusts cannot be invoked to effectuate an incomplete gift nor can equity assist a volunteer. The rule is that the donor must have done everything according to the nature of the property to transfer the property to the donee and render the settlement binding on him. The policy reason behind this

principle is that where no consideration is provided, the donor can always change his/her mind before the gift is perfected. In *Milroy v. Lord*, even the signing by the deceased of a deed in favour of his niece was declared to be an ineffective declaration of trust as the wrong transfer forms were used and the shares did not reach the share register.

[19] Now, it was argued by the plaintiffs that the facts and evidence disclosed a constructive trust because the property was acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest and that equity converts him into a trustee. Their case is not that they are beneficiaries under an incomplete express trust which they are now seeking specific enforcement of. Their case is that *ab initio* the 1981 agreement constituted a constructive trust of the promise that Dawood made unto Ammaji. In violation of that constructive trust, Ammaji conveyed the subject property to herself with the connivance of the second defendant who was the principal architect and beneficiary of the scheme. By reason of their conduct in all the circumstances of the case, the first to the fourth, and the sixth defendants, were constructive trustees and liable to the plaintiffs upon the proprietary claim brought against them.

[20] In this respect, we must respectfully disagree. Unlike the cases cited by the plaintiffs, it must be noted that in our present case, all the children were strangers to the agreement and mere volunteers. The only person who could constitute himself as a trustee under the 1981 agreement was Dawood himself. He could have either conveyed the shares to the beneficiaries or declare himself a trustee of the shares. He did neither.

[21] It would have been a simple matter to effectuate the transfer of the shares by executing the duly completed share transfer forms in favour of the plaintiffs and forwarding the relevant individual share certificates to them. The test of equipping the donee with title documentation so that transfer could be effectuated without recourse to the donor or the test that the donor had done everything at his end to effectuate the transfer is woefully missing in this case.

[22] In our view, the test of whether there was in existence a trust in this case is really this. Could the appellants have enforced the 1981 agreement against Dawood before his demise? The answer must plainly be in the negative. As no consideration was provided, the shares were meant as a gift. As the donor, the shares were for Dawood to deal with and despite the use of the word "forthwith" in the 1981 agreement, he did nothing to affect the transfer of shares. As a result, we are unable to see how Dawood's conscience was bound and consequently how Ammaji could be termed a constructive trustee. In our considered view, the Court of Appeal was right to come to the conclusion that no trust was created as Dawood did not have any intention to create a trust nor could he be said to have held the shares as trustee for the plaintiffs.

[23] We are also constrained to add, with respect, that the questions of law upon which leave to appeal was granted in relation to the issue of trusts are of no consequence and rendered irrelevant or academic by our finding that no such trust existed. Whilst we commend the industry of both counsel in enlightening the court with the law in this context, we say with utmost respect that most of the cases cited offered no assistance to us in determining the pivotal question as they were mostly irrelevant or distinguishable on the facts.

[24] As such, we do not find it necessary to deal with all the cases and the relevant questions of law except to state that the principle in *Milroy v. Lord* applies to the facts in the present case and the case of *Pennington v. Waine* [2002] 1 WLR 2075 and others cited by the plaintiffs were peculiar to their own facts. These other cases were concerned with the question of whether the legal owner of shares had made a valid gift of them. For example, in *Pennington*, the share transfer forms were signed by the donor for the transfer of 400 shares to her nephew before she died. Pennington, who represented the company's auditors, overlooked the registration of the shares. The Court of Appeal held that the donor's intention was so clear that it would be unconscionable for her to deny the gift. Further, and this appeared to be significant, there was detrimental reliance by the nephew as he assumed the onerous duties of a director with his consent to accept the shares.

[25] In any event, it is pertinent to note that the Court of Appeal in *Pennington* accepted the principle that equity will not assist a volunteer. So, in the case of an imperfect gift to a volunteer, the court will not regard it as a declaration of trust. This is precisely the status of the parties and their rights in the instant case – and which is a far cry from the facts which were present in *Pennington.* This principle was more recently reiterated by the UK Court of Appeal in *Zeital & Another v. Kaye & Others* [2010] EWCA Civ 159 where it was accepted that the donee of shares "will only become their legal owner upon being later registered as a member, a matter commonly outside the donor's control; and until such registration, the donor will remain the legal owner. But once the donor has done all in his own power to transfer the shares, he will be regarded as holding the legal title to them upon trust for the donee, who will thereupon become their beneficial owner." (at para. [40]).

[26] In view of our finding that there was no trust, the next question of whether the claim was barred by limitation or the doctrine of laches becomes moot. So, we do not propose to deal with the submissions on this issue except to say that, in any event, we agree with the decision of the Court of Appeal and the reasons provided for finding that limitation has set in and that the doctrine of laches acted against the plaintiffs in the instant case. In particular, we note that the claim in present case is not for the recovery of trust property but a monetary equivalent of the shares. Also, a strong case for laches was made out when the action was only brought many years later when all the witnesses to the 1981 agreement had passed away.

[27] We come now to the issue of the sale of the Pasla Holdings land to Azinal. The events involving the sale transactions can be garnered from the judgments of the courts below. In 1986, an agreement was reached between Dawood and Tan Sri Azman Hashim ("TS Azman"), who were friends and business partners, to sell Pasla Holdings' land in Labu to Azinal. A joint venture agreement dated 6 January 1984 had earlier been entered into between Pasla Holdings and Azinal to develop the said lands but the venture never took off. The defendants contended that the purchase price was RM5.6 million as evidenced by a letter of offer from TS Azman dated 27 August 1986 which Dawood accepted. The letter also enclosed a cheque for RM4.5 million as part-payment of the purchase price with the balance to be paid within three years and Dawood acknowledged the payment.

[28] However, a formal agreement was signed only after Dawood's demise. So, on 18 June 1991 after an Extraordinary General Meeting of Pasla Holdings held on 4 June 1991, chaired by the second defendant, it was unanimously resolved that Pasla Holdings' Directors enter into the formal agreement. The balance of RM1.1 million had been paid, according to Azinal, in staggered payments, on 22 September 1989 (RM250,000), 12 October 1990 (RM400,000), 25 July 1991 (RM200,000) and the final balance of RM327,709.88 (inclusive of interest) on 18 October 1995 after payment of real property gains tax.

[29] Subsequently in 2012, Vision Wagon expressed an interest to purchase the whole of the Pasla Holdings lands in Labu which included the 180 acres sold to Azinal *via* the 1991 agreement. This was formalised into a sale and purchase agreement dated 3 December 2012 for a consideration of RM61,972,993.21. Both Pasla Holdings and Azinal agreed to go ahead with the sale to Vision Wagon pursuant to the earlier mentioned joint venture agreement. At that point in time, Azinal was not the registered owner of the said Labu land which they bought because they only received the original title deeds from Pasla Holdings in December 2009. The memorandum of transfer had been rejected by the land office on 18 March 2010 because the parties failed to get the approval for the sale from the Estate Land Board. Further, there was also an order issued by the Syariah High Court on 7 October 1999 prohibiting any dealings with the land which order was only lifted on 16 August 2007.

[30] The sale to Vision Wagon of the said Labu lands was sanctioned by a resolution passed by Pasla Holdings in an Extraordinary General Meeting held on 10 September 2012 for not less than RM45 million or RM2.65 per square feet. This was followed by another resolution by Pasla Holdings' Board of Directors for the same sale but for RM61,972,993.20 or at RM3.60 per square feet. The sale and purchase agreement in its recital acknowledges that part of the lands have been caveated by Azinal and the amount payable to it for the final and unconditional release and discharge of Azinal's claim

as well as the withdrawal of its caveats over the land. A second sale and purchase agreement in their joint names for the said sale was entered on 3 December 2012.

[31] Now, the High Court after evaluating the evidence adduced held that there was no genuine sale by Pasla Holdings to Azinal *vide* the 1991 sale and purchase agreement. The court went on to hold that the said agreement was a "sham agreement". On appeal, the Court of Appeal, however, disagreed that it was a sham agreement. The court took the view that if it were, there would have not been a need to pay real property gains tax of RM250,525 as evidenced by a certificate dated 30 April 1996 issued by the Director-General of Inland Revenue Malaysia which clearly stated not just the amount paid but the disposal date of 18 June 1991.

[32] The Court of Appeal further held that it would be wrong to set aside the sale when the sale had been resolved at the Extraordinary General Meeting of 4 June 1991. The court noted that the first plaintiff attended that meeting and he also admitted in cross-examination that he knew beforehand about the sale because Dawood told him about the payment of RM4.5 million by Azinal. The third plaintiff in his cross-examination also admitted that they all knew about the joint-venture with Azinal even before the winding-up and Syariah Court proceedings. Yet nothing was done by either one of the plaintiffs, jointly or severally, to prosecute their allegation that it was a sham sale in all these years.

[33] In this respect, it is our considered view that the Court of Appeal was justified in disagreeing with the High Court's findings. The High Court's finding that the consideration of RM5.15 million was never paid by Azinal to Pasla Holdings was clearly unsustainable and against the weight of evidence and contradicted the first plaintiff's own admission as well as the contemporaneous documents adduced at the trial. As for the claim that the sale of the lands was below market value, the plaintiffs, if they felt that the properties were sold below market value, could have quite easily produced a valuation report to show otherwise or even call for a shareholders' meeting with regard to the purchase price.

[34] However, as it turned out, and quite significantly as noted by the Court of Appeal, the plaintiffs never objected at any point of time to the sale or the price prior to the filing of this suit. The High Court had thus erred in law and/or fact when it held that the market value of the lands at around RM6 per square feet without reference to any independent valuation report produced to support the price and further, by erroneously relying on a private valuation for the purpose of land acquisition of RM6 per square feet which was never accepted by the High Court during the 2010 land acquisition proceedings.

[35] It is settled law that an appellate court can reverse a lower court's findings on evidence under the plainly wrong test, if there was no proper judicial appreciation of the evidence by the lower court and where the court had ignored cogent contemporaneous documents. In our view, the instant case revolved not merely on credibility of witnesses but more on agreed issues of law as well as contemporaneous documents. These matters, in our respectful view, were completely overlooked or glossed over by the High Court. In the circumstances, it is our judgment that the Court of Appeal was entitled to reverse the findings of the trial judge and in fact did so on cogent reasons as provided in the grounds of judgment.

Conclusion

[36] In conclusion, and for the reasons we have provided, we dismiss the appeals and affirm the decision of the Court of Appeal. In particular, we affirm that no trust was created as Dawood did not have any intention to create a trust nor could he be said to have held the shares as trustee for the plaintiffs. This must have been the case as Dawood did not take a single act to effect the transfer of the shares in all the eight years period prior to his death. There was therefore an imperfect gift only. We also affirm that Ammaji was never a constructive trustee and even if she was, limitation and laches would apply. Finally, no loss was suffered by any of the beneficiaries as the sale to Azinal was not a sham sale and the sale to Vision Wagon was proven to be at market price.

[37] As we have dealt with the core issues in this appeal, we find it unnecessary to answer any of the leave questions. Lastly, as was conceded by the parties, and to avoid any further confusion, the plaintiffs are entitled to any profits from the sale of the lands in question up to the extent of their existing shareholding but not to the extra shares which was the subject matter of the instant action. The respondents are entitled to costs for each of their respective appeals.